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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1974

No. 74-1022

PAUL LUCERO, a minor child,

Petitioner,

vs

ROOSEVELT IRRIGATION DISTRICT,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court
of the State of Arizona

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below is adequately set forth in the Petition as contained in the Appendix thereto.

JURISDICTION

It is Respondent's position that this

case is not one over which this Court should exercise jurisdiction. Petitioner states that the jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), which states that final judgments rendered by the highest court of a State may be reviewed by the Supreme Court where the validity of a State statute is drawn in question as being repugnant to the constitution of the United States. The special treatment afforded to water distribution systems by the State of Arizona rests not upon a statute or legislative enactment of any kind, but rather upon a judicial decision of the Supreme Court of the State of Arizona rendered in 1909 with respect to whether the turntable decision of Railroad Co. vs. Stout, 84 U.S. (17 Wall.) 657 (1873), applied to open flumes, irrigation ditches, etc., and if not, whether it should be extended to the same. With respect to whether

the turntable decision already applied to such water distribution facilities, the Court, in Salladay vs. Old Dominion Copper Mining & Smelting Co., 12 Ariz. 124, 100 P. 441 (1909), stated at 130, 442:

> "If the Stout case is to be considered as the annunciation of a doctrine of the liability of persons for such injuries to young children, the logical result of such doctrine would seem to be that every landowner must, at his peril, render his premises, as has been said, 'child proof'; but the decision in the Stout case was not a decision announcing a new rule of law, but it was an innovation upon the theretofore accepted rule that a landowner is not liable for the visible condition of his premises to one who enters upon them without permission. It is therefore an exception to a well-known rule of law, rather than in itself a rule of law. Whatever may seem to be the logical deduction that can be drawn from such exception to the rule, when applied to other conditions and circumstances, we do not believe it was the intention of the Supreme Court of the United States by its decision to include in such exception to the rule all cases of such injuries, however occasioned. The Stout case

> being an exception to the rule, we are inclined to confine the extent of the decision therein to conditions where the land owner has neglected some usual or customary precaution, or where the danger to be guarded against was temporary or unexpected, or not entirely open to observation--such conditions as the Supreme Court had before it and has passed upon in the two cases cited--and to hold that the decision does not reach cases where the danger is not only obvious, but where the object itself from which the danger arises is of such a character that, as has been said, 'from the reason of the thing and the customs of the community the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto as they easily could and ought to have done.'"

The Arizona Supreme Court clearly felt that the turntable decision was an exception to the general rule and that it did not cover the conveyance of water in an open flume, irrigation ditches, etc.

With respect to whether the turntable decision should be extended to cover water

being conveyed in open flumes and irrigation ditches, the Court stated at 129, 442:

> "As to the latter question, we are clearly of the opinion that it should not be extended. It is a matter of common knowledge that alluring and attractive flumes, such as the one in question in this case, carrying running water, are extensively used in this territory, not only by miners in the necessary and proper conduct of their business, but by farmers in the necessary diversion and applications of the public streams to a beneficial use upon their lands in the cultivation of their crops. Not only flumes, but irrigation ditches, large and small, similar in purpose, construction, and use, and equally dangerous and alluring to the child, are to be found throughout the territory wherever cultivation of the land is carried on, and such conduits, practically impossible to render harmless, are indispensable for the maintenance of life and prosperity. There is no distinction that can properly be drawn for liability for injuries received by a child from any such various means of diversion or use of water. Both as a matter of law and as a matter of public policy we feel that the so called 'turntable doctrine' should not be

extended to cover such a case as is here presented."

Through a series of subsequent decisions, the Arizona courts have broadened the description of water distribution facilities to which it felt the turntable decision should not be extended to include cement irrigation boxes, City of Glendale vs. Sutter, 54 Ariz. 326, 95 P.2d 569 (1939), the maintenance of a wier at its pumps for the purpose of measuring water to be used for irrigation purposes, Lee vs Salt River Valley Water Users Association, 73 Ariz. 122, 238 P.2d 945 (1951), the failure to properly install and maintain a grate at the entrance to an underground culvert, Hersey vs. Salt River Valley Water Users Association, 10 Ariz. App. 321, 458 P.2d 525 (1969), and now the failure to install a grate on the downstream side of a diversion box diverting the flow of water from an underground box by way of the Arizona Supreme

Court's refusal to review the Arizona Court of Appeals' decision affirming summary judgment in favor of respondent.

In one of its most recent pronouncements with respect to the refusal to extend the turntable decision to waterways, the Arizona Supreme Court stated in Dombrowski vs Maricopa County Municipal Water Conservation District, 108 Ariz. 277, 496 P.2d 136 (1972) at 277, 138:

> "It may be that in a proper case there can be shown a 'meaningful distinction' between the immunity that this Court has historically given to open irrigation canals on the one hand, and the negligent design and maintenance of mechanical or electrical equipment, wiers, dams and diversion points in congested urban areas on the other hand. While this case is certainly tragic, we do not believe it presents such a 'meaningful distinction' that it would require us to modify our previous decision in this field of the law."

It is respondent's position that the decision as to whether the turntable doctrine applies to the facts in this case or

whether it should be extended to cover the same is clearly a matter for the Arizona judiciary and not one which involves a state statute or legislative function of any kind and, therefore, does not invoke the jurisdiction of this Court, pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

The ultimate question before this Court is whether the failure or refusal of the Arizona Supreme Court to extend the turntable decision (attractive nuisance doctrine) to the construction of underground irrigation pipes by irrigation districts is a violation of Petitioner's right to due process and equal protection under the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition, except that the matters for this Court's consideration do not involve the Arizona Constitution.

STATEMENT

This litigation involves a portion of respondent's irrigation system consisting of a diversion box, or turnout box, the purpose of which is to change the direction of the flow of water. The diversion box in question is approximately forty-eight inches wide by 105 inches deep. There was a ladder permanently affixed to the inside of the wall of the diversion box. In addition, there were two pipes entering the box--one from the upstream side, and one from the downstream side. The pipe entering on the upstream side carried water into the box through underground pipe of more than 2,500 feet in length. The top of the box was covered with a metal plate which had been welded to the box to prevent children from removing and discarding it. The pipe entering the box on the downstream side through which water emptied

from the box into an open lateral was thirty inches in diameter. There was no grate on the downstream side for the reason there would be no way to remove such trash as may accumulate behind the grate hindering the flow of water through the box.

On August 7, 1969, plaintiff and a friend entered the box from the downstream side, carrying with them several boards. Once inside the box, the boys deliberately boarded up the downstream pipe, preventing water from escaping, and apparently creating such pressure against the boards as the box filled with water that the boys were unable to remove them. Thus, they were unable to escape from the trap they had created for themselves, all of which caused injuries to the plaintiff.

Plaintiff brought suit against defendant, wherein plaintiff alleged that the

accident and injuries were the proximate result of defendant's negligence. The matter was decided in favor of respondent by the trial court on a motion for summary judgment wherein respondent argued that as a matter of law the possessor of land had no duty to a trespasser except to refrain from willful and wanton negligence and that the turntable decision of Railroad Co. vs Stout, supra, or attractive nuisance doctrine was not applicable as a result of Salladay vs Old Dominion Copper Mining & Smelting Co., supra, and its progeny. The trial court's decision was affirmed on appeal in the Arizona Court of Appeals, and the Petition for Review to the Arizona Supreme Court was denied.

ARGUMENT

Respondent has set forth in the jurisdictional section of this brief its argument that this Court should not exercise juris-

diction over the Arizona Supreme Court's judicial decision not to extend the attractive nuisance doctrine to the facts of this case.

If the Court finds that it may exercise jurisdiction, then, it is Respondent's position that the Court, in its discretion, should not accept review of this matter for the reason that the record clearly shows that the Arizona Supreme Court, by refusing to extend the attractive nuisance doctrine to irrigation systems, has judicially created a class of persons consisting of irrigation system owners for which it has granted an immunity from tort liability under the attractive nuisance doctrine arising from the negligent construction, maintenance and operation of the irrigation system. Furthermore, it is clear, from the record, that the Arizona Supreme Court's actions have not been arbitrary or

capricious, that they are not unreasonable and that they do have a real and substantial relation to the subject sought to be attained. Nebbia vs New York, 291 U.S. 502 (1934). Subsequent authorities are replete with similar language, such as Phillips Chemical Co. vs. Dumas School District, 361 U.S. 376, 385 (1960), wherein this Court stated:

> "It is true that perfection is by no means required under the equal protection test of permissible classification. ... In Allied Stores of Ohio, Inc. vs Bowers (U.S.), supra, for example, we noted that the State was 'dealing with (its) proper domestic concerns, and not trenching upon the prerogatives of the National government'. When such is the case, the State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." (Citations omitted.)

In a United States District Court case involving a situation very similar to the present one, the court upheld a state law

as not being violative of the Fourteenth Amendment to the United States Constitution which exempted charitable institutions from the doctrine of respondeat superior in tort liability cases. After indicating that a state law, even though it discriminates in favor of a certain class, is not arbitary and violative of equal protection if the discrimination is founded on a reasonable distinction, the Court in Weeks vs Childrens Hospital of Philadelphia, 200 F.Supp. (E.D. Pa. 1961), stated at 79:

> "The state has the power to provide for the health of its citizens. Non-profit hospitals which are supported in large measure by state funds bear a close relationship with this power. The health of the state's citizens might properly be considered in possible jeopardy if these charitable hospitals were made liable under the doctrine of respondeat superior for tort injuries caused by their servants.[5]

Footnote 5 to the above quotation states:

> "Defendant Hospital, in its

> Reply Brief, alludes, for instance, to the liability insurance which the hospitals would have to procure, the additional expense involved both to the institutions and the state, the likely raise in hospital rates to help cover the additional expense, and the resulting withdrawal of opportunity to serve as many members of the community in the event of a change of the present rule."

See also the case of McDaniel vs Baptist Memorial Hospital, 469 F.2d 230 (6th Cir. 1972), where the court upheld as constitutional a Tennessee law which exempts hospitals from liability for breach of implied warranties of merchantability and fitness from a contract for sale of blood, which statute had the effect of immunizing the hospitals from strict liability in tort for the wrongful death of a patient alleged to have been caused by serum hepatitis due to transfusion of contaminated blood.

Indeed, what the Arizona judiciary has done is to single out irrigation and water distribution systems for special treatment

with respect to the application of the attractive nuisance doctrine for reasons rooted deep in the history of Arizona, an arid desert land whose very economic survival depends on its ability to furnish low cost water to farms, industry and others throughout the entire state. For this reason, as expressed in Salladay vs Old Dominion Copper Mining & Smelting Co., supra, and reaffirmed in Dombrowski vs Maricopa County Municipal Water Conservation District, supra, the Arizona judiciary has seen fit to draw a classification so as to enable irrigation and water distribution systems owners to distribute water throughout the state to the many consumers thereof at a realistic rate.

Petitioner's contention that the means selected does not have a real and substantial relation to the ends sought to be attained is simply not correct. Upon a

careful reading of Salladay, it is clear that the end sought was to enable irrigation and water distribution systems to deliver water to the users thereof at a reasonable, economic rate. The means chosen by the judiciary then and now were to grant an immunity to such distribution systems from tort liability under the attractive nuisance doctrine. Certainly, the abolition of the immunity heretofore granted to these water distribution systems would have severe economic impact through the undertaking of a nearly impossible task of rendering their waterways absolutely free from the inquisitive child, great losses of money in judgments against these systems owners, and increased insurance premiums if there be such a company willing to undertake so great a risk. All of these increased costs and risks of liability would necessarily greatly increase the cost

of water distribution, the very end which was sought to be prevented through granting of an immunity.

With respect to whether the immunity from tort liability under the attractive nuisance doctrine should be abolished and the economic impact that such an abolition would have upon the cost of water distribution in the State of Arizona, the Court in Dombrowski vs Maricopa County Municipal Water Conservation District, supra, had before it in the briefs for appellant, appellee and amicus curiae substantial arguments concerning all of the relevent considerations. The Court had before it two motions for leave to file amicus curiae briefs on behalf of Wellton-Mohawk Irrigatic and Drainage District, a municipal corporation, and Yuma County Water Users Association, an Arizona non-profit corporation, which briefs devoted themselves almost

entirely to the subject of the adverse economic impact that an abolition of the immunity from tort liability under the attractive nuisance would have on them individually and the entire state.

In view of the foregoing, it is difficult to conceive that the actions of the Supreme Court in Dombrowski vs Maricopa County Municipal Water Conservation District, supra, in reaffirming the immunity given to irrigation districts from tort liability under the attractive nuisance doctrine, were arbitrary and capricious and without a substantial relation to the end sought, that of enabling the low cost distribution of water "especially when the very life blood of our economic stability rest[s] upon the irrigation of our arid lands." Lee vs Salt River Valley Water Users' Association, supra.

Certainly, as the Court said in Dom-

browski, supra, at 277, 138:

> "It may be that in a proper case there can be shown a 'meaningful distinction' between the immunity that this Court has historically given to open irrigation canals on the one hand, and the negligent design and maintenance of mechanical or electrical equipment, wiers, dams and diversion points in congested urban areas on the other hand."

However, it is clear from the Court's actions in the present case that it did not feel this case presented such a meaningful distinction. It is also apparent from the foregoing that when the Court does find a case involving such a meaningful distinction it will not hesitate to carve out appropriate exceptions to the presently existing immunity.

CONCLUSION

Based upon the absence of proper jurisdiction and the fact that the immunity from tort liability under the attractive nuisance doctrine afforded irrigation districts is a

proper classification, based upon a sound, rational basis substantially related to the ends sought, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 13, 1975